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No. 03-1073

Supreme Court, U.S.
FILED
APR 30 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

H.C. BAILEY, JR., ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR FRANKLIN SAVINGS CORPORATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION ADDRESSED BY *AMICUS*

Under this Court's precedents, the government's seizure of a viable business, and the subsequent destruction of the economic value of that business, constitutes a taking requiring just compensation under the Fifth Amendment. The government seized and rendered valueless profitable businesses owned by petitioners and by *amicus*. Did the lower court err in following Federal Circuit precedent holding that the government need not pay just compensation where the business seized and destroyed is a savings and loan institution?

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Amicus curiae respectfully submits that the petition for a writ of certiorari should be granted.[1]

[1] Pursuant to Rule 37.6 of this Court, *amicus* states that no party had any role in writing this brief and that no one other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed with consent of all parties; their letters of consent have been filed with the Clerk.

INTEREST OF *AMICUS*

The second question presented by petitioners in this case is whether the Federal Circuit erred in rejecting as a matter of law their claim that the government's seizure and destruction of a private business—a savings and loan institution worth at least $44 million—constituted a taking requiring just compensation under the Fifth Amendment. The government also seized and destroyed a thrift owned by *amicus*. The Court of Federal Claims, claiming to follow Federal Circuit precedent, denied the takings claim of *amicus* for reasons similar to those adopted in the decision below. The case brought by *amicus*, now on appeal to the Federal Circuit, involves no "goodwill" contract with the government, and thus is not a "*Winstar*-related" case.

The takings claims asserted by *amicus* (hereafter "Franklin Corp."), arise from the seizure and destruction of Franklin Savings Association under the following circumstances: Franklin Corp. owned almost all the stock of Franklin Savings, a thrift that prospered in the 1980s. From 1984 through 1988, Franklin Savings received very favorable examination ratings from federal regulators. By 1989-90, the thrift had GAAP capital exceeding $370 million, well above regulatory requirements, and a going-concern value of between $250 and $700 million. *Franklin Sav. Ass'n v. OTS*, 742 F. Supp. 1089, 1122-23 (D. Kan. 1990), *rev'd on other grounds*, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992).

After FIRREA, government regulators suddenly raised questions about Franklin's accounting practices—all of which have been proven to be unfounded (even as of the time when raised). Although Franklin had demonstrated to government regulators at the time that Franklin's accounting was proper under GAAP and applicable regulations, *see id.* at 1112, in February 1990 the OTS Director appointed the Resolution

Trust Corporation as "conservator" for Franklin Savings, specifically "not for the purposes of liquidation." 934 F.2d at 1135.

Both Franklins brought an action to remove the conservator under 12 U.S.C. § 1464(d)(2)(E) (2003). Following an extensive trial, the district court concluded that the administrative record upon which the OTS Director had based the appointment "contained fundamental factual errors as well as material errors of interpretation and analysis," 742 F. Supp. at 1106. Instead, the trial evidence established (1) that "OTS lacked any factual basis [for] its appointment of a conservator under the three statutory grounds [it] relied [upon]." *id.* at 1126; (2) there was "clear proof that Franklin [Savings] was not insolvent or in a weakened condition at the time the conservator was imposed," *id.* at 1124; (3) the thrift "had GAAP capital of $387 million on December 31, 1989," *id.* at 1122; and (4) "the going concern value of Franklin [was] . . . $250-700 million," *id.* at 1123. The court also found that capital write-downs that OTS directed *after* the conservator's appointment, which were financially devastating to Franklin Savings, also "[were] arbitrary and capricious and lacked any reasonable basis." *Id.* at 1108-10. The court ordered the government's conservator removed. *Id.* at 1128. The Tenth Circuit reversed on appeal, holding that FIRREA prescribed very limited judicial review of thrift-conservator appointment decisions. 934 F.2d at 1140. The Tenth Circuit later justified this result by pointing to the availability of after-the-fact monetary relief under, *inter alia*, the Just Compensation Clause of the Fifth Amendment. *Franklin Sav. Ass'n v. OTS,* 35 F.3d 1466, 1472 (10th Cir. 1994).

RTC served as Franklin Savings' conservator for more than two years, during which the government ceased making new loans and otherwise discontinued the thrift's business, and dissipated its assets. OTS eventually replaced the conservator with a receiver (also RTC), which then sold the thrift's remaining property. The FDIC (RTC's successor as receiver)

remains in possession of Franklin Savings to this day. But Franklin Corp., which was forced into bankruptcy, has never received any receivership distribution. Thus, although Franklin Corp. owned a thrift whose business was worth at least $250 million the day before the government appointed its "conservator" for Franklin Savings, today that business is worthless, and Franklin Corp. has received nothing from the thrift's receivership.

Franklin Corp. and Franklin Savings instituted various claims in the former's bankruptcy case seeking after-the-fact monetary relief as the Tenth Circuit had directed. *See also Franklin Sav. Ass'n*, 934 F.2d at 1141 ("a conservator ordinarily acts as a guardian or a protector"). After their takings claims were transferred to the Court of Federal Claims, however, that court dismissed the claims on the basis of the same Federal Circuit precedent that led to dismissal of Bailey's takings claim in this case. *Franklin Sav. Corp. v. United States*, 46 Fed. Cl. 533, 535-36 (2000) ("On three occasions, the Federal Circuit has explicitly held that such seizure of a financial institution does not constitute a Fifth Amendment taking.") (citations omitted). That dismissal ruling is on appeal to the Federal Circuit.

SUMMARY OF ARGUMENT

In this case and that of *amicus,* the government physically intruded upon (or "seized") the claimant's business property and also destroyed the economic value of that property. Although the resulting takings claims should therefore be deemed "categorical" takings under both *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Federal Circuit denied the takings claim in this case (and the Court of Federal Claims denied the takings claim of *amicus*) by applying a series of prior Federal Circuit decisions that have largely declared the constitutional guaran-

tee of just compensation in the event of a governmental taking inapplicable to an entire sector of the American economy—the regulated financial services industry. *See Bailey v. United States*, 341 F.3d 1342, 1346-47 (Fed. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3506 (U.S. Jan. 26, 2004) (No. 03-1073); *Castle v. United States*, 301 F.3d 1328, 1341 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 2572 (2003); *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995); *Golden Pac. Bancorp. v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir.), *cert. denied*, 513 U.S. 961 (1994); *California Housing Secs., Inc. v. United States*, 959 F.2d 955, 957-58 (Fed. Cir.), *cert. denied*, 506 U.S. 916 (1992). The petition for writ of certiorari should be granted to ensure that the Federal Circuit applies this Court's Takings Clause jurisprudence in a manner that affords the owners of financial institutions the same constitutional protections as owners of other types of businesses.

ARGUMENT

It matters not whether the issue is considered under *Loretto* or *Lucas*, for either decision on its own—and surely their combined thrust—shows that the government has taken the property of the thrift owners without paying just compensation.

A. In this case and that of *amicus*, the lower courts have disregarded a long line of this Court's precedent culminating in *Loretto*, where the Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." 458 U.S. at 426. Indeed, as *Loretto* recounts, *see id.* at 427-35, this Court has consistently treated the government's seizure of a business as a *per se* taking. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280 (1926). In fact, the Court has often cited busi-

ness seizure cases to *distinguish* such *per se* takings from mere regulatory takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 & n.18 (2002); *Loretto*, 458 U.S. at 431-32; *see also First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 331-32 (1987) (Stevens, J., dissenting).

In explicitly declining to apply the rule of *Loretto*, *see California Housing Securities,* 959 F.2d at 957-58, the Federal Circuit accepted the bare existence of federal regulation as justification for wholesale seizures of financial institutions. *See id.* at 959 ("Given [the] long history of government regulation of savings and loan associations, [plaintiffs] were certainly on notice that [the thrift] might be subjected to different regulatory burdens over time."). In particular, the Federal Circuit concluded that as a "consequence" of the regulated environment in which thrifts operate, thrifts and their owners "h[o]ld less than the full bundle of property rights on which a *Loretto* expectation of compensation is founded." *Id.* at 958. This conclusion violates both the rule and the underlying rationale of *Loretto*. As this Court there explained, "when the 'character of the governmental action,' *Penn Central* [*Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)], is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic import on the owner." *Loretto*, 458 U.S. at 434-35.

B. Even apart from *Loretto*, and this Court's business seizure takings cases on which it is built, *see Loretto,* 458 U.S. at 427-35, the decision below and the Federal Circuit precedent that led to dismissal of *amicus*' takings claims are contrary to this Court's Takings Clause jurisprudence for a separate reason: they also disregard *Lucas.* In addition to physically seizing the thrifts previously owned by Bailey and *amicus*, the government through its regulatory actions has

completely destroyed the economic value of these thrifts. By doing so the government went "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Although regulatory takings claims frequently involve a contextual weighing of a number of factors, this Court emphasized in *Lucas* that the Constitution imposes a "categorical rule that total regulatory takings must be compensated." 505 U.S. at 1026. *See also United States v. General Motors Corp.*, 323 U.S. 357, 378 (1945) ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.") (footnote citing cases omitted).

The Federal Circuit has sought to avoid this established "total regulatory takings" doctrine in bank seizure/takings cases like this one on essentially the same ground that the court sought to avoid *Loretto*, namely, by pointing to the existence of extensive regulation in the banking and thrift industries—"[g]iven the highly regulated nature of the banking industry, just as under a *Loretto* analysis [the bank] could not have had a historically rooted expectation of compensation for the Comptroller's actions, so too, the Comptroller's actions could not possibly have interfered with a reasonable investment-backed expectation on the part of [the bank]." *Golden Pac. Bancorp*, 15 F.3d at 1074. But the existence of prior regulation does not alone create an exception to the rule of *Lucas* either, *see* 505 U.S. at 1029-32, and therefore prior regulation alone should not be held to authorize the government to completely eliminate an owner's valuable interest in his property. Indeed, in *Palozollo v. Rhode Island*, 533 U.S. 606, 626 (2001), this Court specifically rejected the assertion that "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations."

C. To put the issue most pointedly, the Federal Circuit's rulings as applied in this case effectively nationalize the thrift and banking industries by holding that owners of financial institutions have a mere possessory license that can be revoked without just compensation (or due process). Although the court's rationale would seem to apply to any industry with a history of extensive federal (or state) regulation, these rulings are all the more troubling because they single out the financial institutions industry for this dubious, disproportionate treatment. *Compare Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) (change in law held to be a regulatory taking in the subsidized housing industry, despite existence of heavy regulation). In the bank-seizure context, these rulings seem to say that government action *never* can "'go[ ] too far [so as to] be recognized as a taking,'" *Lucas*, 505 U.S. at 1014 (quoting *Pennsylvania Coal*, 260 U.S. at 415), whether the government breaches a contract, physically seizes and occupies a banking institution, expropriates a thrift's value, or as "conservator" drives a bank or thrift into the ground. This Court's rulings show that that understanding is wrong.

1. No doubt the property interests protected by the Fifth Amendment must be assayed against the backdrop of applicable regulation, which can help shape what are reasonable expectations entitled to protection. However, that the thrift industry has a history of federal regulation (and, for that matter, deregulation) does not strip the owners of thrifts of all stability in their economic expectations safeguarded by the label "property." To the contrary, this Court has held that there remains an irreducible core of protected property interests possessed by financial institutions, even in the doubly regulated area of the rights in bankruptcy of financial institu-

tions as against their debtors. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).[2]

The Federal Circuit's approach to thrift- and bank-seizure takings claims—which rests on a degree-of-federal-regulation test rather than a just-compensation inquiry—imperils the ability of any substantially regulated industry to solicit investment and raise capital, because in the Federal Circuit's view the greater the regulation the less the Constitution protects the property. At the extreme, which is where the Federal Circuit apparently views the heavily-regulated financial institutions industry, the degree of regulation has thus far led the court to rule invariably that the seizure of a thrift or bank can never be a taking. That startling result has been rejected by this Court at least since the seminal regulatory-takings decision in *Pennsylvania Coal,* where Justice Holmes' opinion for the Court recognized that, if "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *See Lucas*, 505 U.S. at 1014 (quoting *Pennsylvania Coal*, 260 U.S. at 415). For the financial-institutions sector, the string of Federal Circuit decisions including *Bailey* have indeed brought us to the point where private property has largely disappeared. Given the Federal Circuit's nationwide jurisdiction, this lack of protection for the property interests of thrift and bank owners is currently the law of the land, and plainly warrants review here to bring the Federal Circuit back into line with this Court's rulings. *See Palozolla*, 533 U.S. at 628 ("A blanket

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[2] *Radford* is notable because it deals not only with banking, and its history of extensive regulation, *compare United States v. Philadelphia National Bank*, 374 U.S. 321, 372 (1963) ("banking is a highly regulated industry critical to the Nation's welfare"), but especially because it finds a taking in the teeth of an exercise of Congressional power expressly authorized under the "Bankruptcy Clause" of Article I of the Constitution.

rule that purchasers with notice have no compensation right . . . is too blunt an instrument to accord with the duty to compensate for what is taken.").

2. Neither petitioners nor *amicus* contend that just compensation is owed when the government seizes a thrift that has made itself insolvent. Though the Court's rationale frankly has not always been clear in this regard, in those circumstances the payment of *nothing* is what is "just" and appropriate compensation. Indeed, one reason to issue the writ is to permit this Court to confirm that the propriety of police-power seizures turns not on the source of the government's authority but instead on the justness of not providing compensation when particular property is seized, such as many insolvent thrifts or foodstuffs unfit for human consumption. *See Marion & Rye Valley Ry.*, 270 U.S. at 282 ("For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company. . . .").

But that is not petitioners' circumstance as owners of the seized thrift here. In this case, petitioners unquestionably had a property interest in the thrift's value as of the day before FIRREA was passed, when the thrift was worth $44 million. Thus, petitioners have been denied the value of their investment in their savings and loan, and the deprivation in this case far traverses "the dividing line . . . between everyday regulatory inconveniences and those so severe that they constitute takings." *First English Evangelical Lutheran Church*, 482 U.S. at 330; *see also Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) ("The 'investment-backed expectations' that the law will take into account do not include the assumed

validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.").[3]

Ultimately it is important to distinguish the propriety of the government's seizure of impaired property from those circumstances where the actions of the government itself are what cause the value to become impaired. In the former category are uncompensated takings of property or limitations of the use of property that is noxious. *E.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (law effectively preventing continued operation of quarry in residential area); *Miller v. Schoene*, 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law barring operation of brick mill in residential area); *Mugler v. Kansas*, 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages). In contrast are cases, like the present one and that of *amicus*, where the government's own actions have wiped out the value of the property and just compensation is owed. *See Armstrong v. United States*, 364 U.S. 40, 48 (1960) ("the Government for its own advantage destroyed the value of the liens"). By importing principles from the noxious-property cases to this case and others where the government's own actions impaired—and indeed destroyed—the value of thrift institutions, the Federal Circuit in this case has given the government carte blanche to avoid the requirements of the Just Compensation Clause. *See Branch*, 69 F.3d at 1575 (explicitly rejecting takings claim arising from bank seizure in the face of facts showing that "the government caused the bank's insolvency").

In this case, the Federal Circuit sought to skirt the takings issue by suggesting that the FDIC had a prior right to the full

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[3] The post-seizure conduct of federally appointed conservators and receivers is "governmental" action and "regulatory" in nature. *See, e.g., United States v. Gaubert*, 499 U.S. 315 (1991).

value of the just-compensation claim, because as part of the winding up and liquidation of the thrift the FDIC was subrogated to claims potentially in excess of the thrift's (then) net worth. But the FDIC's subrogation claim, which arises *after* the regulatory takeover, is not dispositive because "[t]he measure of just compensation has always been the loss to the owner, not the loss or gain to the Government." *Pewee Coal*, 341 U.S. at 121 (Reed, J., concurring). The interests of the thrift and its owner are what are at issue, and it is beyond question that the government's actions here have led petitioners to lose their entire investment.

3. Three years ago, this Court recognized that it has "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." *Palazzolo*, 533 U.S. at 617. The magnitude of the error below needs to be corrected. Review should also be granted to preclude erroneous results on similar facts where the government takes over and destroys thrifts and other federally regulated private institutions. This Court should grant the petition to set forth the proper approach for the courts to follow in determining when as here, the "government action goes too far and effects a regulatory taking."

CONCLUSION

The petition for a writ of certiorari should be granted.

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April 30, 2004